

This Opinion is Not a
Precedent of the TTAB

Hearing: November 3, 2021

Mailed: January 24, 2022

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Danica Patrick Brands, LLC

Serial No. 88712080

Bradley J. Walz of Barnes & Thornburg, LLP,
for Danica Patrick Brands, LLC.

Kevin Flebbe, Trademark Examining Attorney, Law Office 110,
Chris A. F. Pedersen, Managing Attorney.

Before Taylor, Lynch, and Lebow,
Administrative Trademark Judges.

Opinion by Lynch, Administrative Trademark Judge:

I. Background

Danica Patrick Brands, LLC (“Applicant”) seeks registration on the Principal Register of the mark DANICA in standard characters for “wine” in International

Class 33.¹ The Examining Attorney refused registration under Trademark Act Section 2(d), 15 U.S.C. § 1052(d), based on a likelihood of confusion with the prior registered mark DANIKA RANCH in standard characters, with RANCH disclaimed, for “Alcoholic beverages, except beers,” in International Class 33.²

After the Examining Attorney made the refusal final, Applicant filed a request for reconsideration and appealed. The Examining Attorney denied the request for reconsideration, maintaining the likelihood of confusion refusal. The appeal then proceeded, was fully briefed, and an oral hearing took place. As explained below, we affirm the refusal to register.

II. Likelihood of Confusion

Our determination under Section 2(d) involves an analysis of all of the probative evidence of record bearing on a likelihood of confusion. *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (setting forth factors to be considered, referred to as “*DuPont* factors”); see also *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). The Board considers only those *DuPont* factors for which there is evidence and argument. *In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019). “Not all *DuPont* factors are relevant in each case, and the weight afforded to each factor depends on the circumstances.” *Stratus Networks, Inc. v. UBTA-UBET Commc’ns Inc.*, 955 F.3d 994,

¹ Application Serial No. 88712080 was filed December 2, 2019, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b). The application includes the statement that the name “shown in the mark identifies Danica Patrick, whose consent[] to register is made of record.”

² Registration No. 5262216 issued August 8, 2017.

2020 USPQ2d 10341, *3 (Fed. Cir. 2020). Two key considerations are the similarities between the marks and the relatedness of the goods. *See In re Chatam Int'l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1945 (Fed. Cir. 2004); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.”).

A. The Goods, Trade Channels and Classes of Consumers

The second and third *DuPont* factors address the relatedness of the goods and the trade channels in which they travel.

Under the second factor, “likelihood of confusion can be found ‘if the respective goods are related in some manner and/or if the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that they emanate from the same source.’” *Coach Servs. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012) (internal citations omitted). In analyzing the relatedness of the goods, we look to the identifications in the application and cited registration. *See In re Detroit Ath. Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1051 (Fed. Cir. 2018); *Stone Lion Capital Partners v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014); *Octocom Sys., Inc. v. Houston Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990).

The cited registration’s broad identification of “alcoholic beverages, except beers” encompasses Applicant’s “wine.” *See S.W. Mgmt., Inc. v. Ocinomled, Ltd.*, 115 USPQ2d 1007, 1025 (TTAB 2015) (where the goods in an application or registration

are broadly described, they are deemed to encompass all the goods of the nature and type described therein); *In re Hughes Furniture Indus., Inc.*, 114 USPQ2d 1134, 1137 (TTAB 2015) (“Applicant’s broadly worded identification of ‘furniture’ necessarily encompasses Registrant’s narrowly identified ‘residential and commercial furniture.’”). We find that the goods overlap and are legally identical.

Applicant makes an odd argument suggesting that the Examining Attorney bore some burden to prove that “alcoholic beverages other than wine” also are related to wine.³ Registrant’s identification excludes beer, not wine. Given the obvious overlap of Registrant’s “alcoholic beverages, except beers” with Applicant’s “wine,” there simply is no need for additional proof of relatedness as to other goods.

Under the third *DuPont* factor, because the goods in the cited registration and the application are legally identical, we must presume that the trade channels and classes of consumers for those overlapping goods also are identical. *See Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1801 (Fed. Cir. 2018); *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (even though there was no evidence regarding channels of trade and classes of consumers, the Board was entitled to rely on this legal presumption in determining likelihood of confusion); *see also Inter IKEA Sys. B.V. v. Akea*, 110 USPQ2d 1734, 1743 (TTAB 2014); *L. & J.G. Stickley, Inc. v. Cosser*, 81 USPQ2d 1956, 1971 (TTAB 2007) (“Because the goods of both parties are at least overlapping, we must presume that the purchasers and channels of trade would at least overlap.”).

³ 9 TTABVUE 13 (Applicant’s Brief).

Applicant offers legally incorrect arguments that rest on extrinsic evidence to limit the goods and channels of trade for the cited registration in ways not reflected in the identification of goods. Pointing to screenshots of Registrant's website and of a press release, and making questionable inferences therefrom, Applicant invites us to narrow Registrant's "alcoholic beverages, except beers" to chardonnay, and to narrow the trade channels to sale at "[Registrant's] winery in Napa Valley, CA."⁴ Contrary to Applicant's contentions, we rely on the identification of goods, which encompasses all types of wine and includes no restrictions on channels of trade. *Octocom Sys.*, 16 USPQ2d at 1787; *see also In re Midwest Gaming & Entm't LLC*, 106 USPQ2d 1163, 1165 (TTAB 2013) ("An applicant may not restrict the scope of the goods covered in the cited registration by argument or extrinsic evidence") (quoting *In re La Peregrina Ltd.*, 86 USPQ2d 1645, 1647 (TTAB 2008).

We reject Applicant's unsubstantiated allegations that simply because a press release refers to Danika Ranch "as a source of beautiful Chardonnay and Sauvignon,"⁵ as Applicant puts it, "there is no ability [of Registrant] to produce a different style of wine."⁶ Even if Applicant's speculation that Registrant currently produces only certain types of wine is correct, it would be of no import. We must "give full sweep" to an identification of goods regardless of a registrant's actual business. *Paula Payne Prods. Co. v. Johnson Publ'g Co.*, 473 F.2d 901, 177 USPQ 76, 77-78

⁴ 9 TTABVUE 11 (Applicant's Brief).

⁵ TSDR February 17, 2021 Request for Reconsideration at 32.

⁶ 9 TTABVUE 12 (Applicant's Brief). Applicant's Reply Brief includes the misleading statement that "it is undisputed that ... the only grapes grown at the Danika Ranch are chardonnay and sauvignon blanc.").

(CCPA 1973). As the Board stated in *In re FCA US LLC*, 126 USPQ2d 1214, 1217 n.18 (TTAB 2018), “[i]n innumerable cases, the Board hears arguments about how the parties’ actual goods, services, customers, trade channels, and conditions of sale are narrower or different from the goods and services identified in the applications and registrations,” but “as stated in equally innumerable decisions of our primary reviewing court, we may consider any such restrictions only if they are included in the identification of goods or services.”

Thus, Applicant’s contentions that trade channels differ based on Applicant only offering rosé wine (when Applicant has broadly identified its goods as “wine”) and Registrant offering only chardonnay fall well outside controlling precedent, and would be unavailing regardless. This type of slingshot maneuver cannot be used to get around a prior registration.

The second and third *DuPont* factors weigh heavily in favor of likely confusion.

B. Similarity of the Marks

We compare the marks “in their entireties as to appearance, sound, connotation and commercial impression.” *Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (quoting *DuPont*, 177 USPQ at 567). “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018), *aff’d mem.*, 777 Fed. Appx. 516 (Fed. Cir. 2019) (citing *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)). We assess not whether the marks can be distinguished in a side-by-side comparison, but rather whether their overall

commercial impressions are similar enough that confusion as to the source of the goods offered under the respective marks is likely to result. *Coach Servs.*, 101 USPQ2d at 1721; *see also Edom Labs. Inc. v. Lichter*, 102 USPQ2d 1546, 1551 (TTAB 2012). Where, as here, the goods are legally identical, the degree of similarity necessary to find likelihood of confusion need not be as great as where there is a recognizable disparity between the goods. *Coach Servs. Inc.*, 101 USPQ2d at 1721; *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992).

We compare Applicant's mark, DANICA, to the cited mark, DANIKA RANCH, and find them similar in appearance, sound and commercial impression. The only term in Applicant's mark is nearly identical to the first and only distinctive term in the cited mark, differing by only one letter. The Board has often found that terms differing by only a single letter are confusingly similar, and we find that to be the case here. *See Apple Comput. v. TVNET.net Inc.*, 90 USPQ2d 1393, 1396 (TTAB 2007) (VTUNES.NET vs. ITUNES); *Interlego AG v. Abrams/Gentile Entm't Inc.*, 63 USPQ2d 1862, 1863 (TTAB 2002) ("Obviously, the marks LEGO and MEGO are extremely similar in that they differ simply by one letter."). These terms likely would be pronounced the same, and they appear highly similar.

While we bear in mind that DANIKA RANCH also contains the word RANCH, "[i]t is not improper for the Board to determine that, for rational reasons, it should give more or less weight to a particular feature of the mark provided that its ultimate conclusion regarding the likelihood of confusion rests on a consideration of the marks

in their entirety.” *QuikTrip West, Inc. v. Weigel Stores, Inc.*, 984 F.3d 1031, 2021 USPQ2d 35 at **5-6 (Fed. Cir. 2021) (cleaned up). The placement of DANIKA at the beginning of the cited mark makes it prominent. *Detroit Ath. Co.*, 128 USPQ2d at 1049 (finding “[t]he identity of the marks’ two initial words is particularly significant because consumers typically notice those words first”); *Presto Prods., Inc. v. Nice-Pak Prods., Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) (first part of a mark “is most likely to be impressed upon the mind of a purchaser and remembered.”).

DANIKA also dominates the cited mark because the other word in the mark, RANCH, is descriptive, and has been disclaimed. This reduces its significance in the likelihood of confusion analysis because consumers would view it merely as referring to the nature of the winery or distillery,⁷ and would not rely on the wording to indicate source. *See In re Dixie Rests.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997). So while the additional descriptive wording in the cited mark creates some difference from Applicant’s mark in appearance and sound, we find the marks overall much more similar than dissimilar, particularly because we must consider the marks “in light of the fallibility of memory.” *See In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1085 (Fed. Cir. 2014) (quoting *San Fernando Elec. Mfg. Co. v. JFD Elecs. Components Corp.*, 565 F.2d 683, 196 USPQ 1 (CCPA 1977)).

⁷ We take judicial notice of the MERRIAM-WEBSTER online dictionary definition that a ranch is “a farm or area devoted to a particular specialty.” (merriam-webster.com, accessed January 15, 2022). The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed format or have regular fixed editions. *In re Cordua Rests. LP*, 110 USPQ2d 1227, 1229 n.4 (TTAB 2014), *aff’d*, 823 F.3d 594, 118 USPQ2d 1632 (Fed. Cir. 2016); *Threshold.TV Inc. v. Metronome Enters. Inc.*, 96 USPQ2d 1031, 1038 n.14 (TTAB 2010).

As to meaning and impression, Applicant's mark and the DANIKA component of the cited mark are variant spellings of a first name. For example, the Bump website provides information on baby names, noting that "Danika as a girl's name is a variant of Danica (Slavic, Latin), and the meaning of Danika is 'morning star; from Denmark.'"⁸ The Baby Name Wizard website identifies "Danika" and "Danica" as related names.⁹ The BabyNames.com website also identifies "Danika" as a female name of Slavic origin, and is "currently #786 in U.S. births."¹⁰ The Nameberry website contains an entry under "Baby Girl Names" for Danika, characterizing it as a "[s]pelling variation of Danica with a modern update."¹¹

The Examining Attorney also introduced Internet evidence of individuals named Danika and Danica, such as Danika Burgess Brown, Rice University Center for Civic Leadership's Director of Curriculum and Fellowships,¹² Danika Cooper, an Assistant Professor of Landscape Architecture & Environmental Planning at Berkeley,¹³ Danika Worthington, a digital strategist for the Denver Post,¹⁴ and Danika Laszuk, the General Manager of Betaworks Ventures' Camp.¹⁵ Other such evidence includes

⁸ TSDR March 10, 2021 Office Action at 2 (thebump.com).

⁹ *Id.* at 15 (babynamewizard.com).

¹⁰ *Id.* at 6 (babynames.com).

¹¹ TSDR August 24, 2020 Office Action at 2 (nameberry.com).

¹² TSDR March 10, 2021 Office Action at 19-20 (ccl.rice.edu).

¹³ *Id.* at 21 (ced.berkeley.edu).

¹⁴ *Id.* at 23 (denverpost.com).

¹⁵ *Id.* at 27 (betaworksventures.com).

the lifestyle website of Danika Brysha,¹⁶ a model and entrepreneur, Danika Laine, the Communications Director of the River Alliance of Wisconsin,¹⁷ Danika McCarthy, a Veterinary Technician with Banfield Pet Hospital,¹⁸ Danika Hineman, a Speech Pathologist,¹⁹ and Danika Stelton, a graphic designer.²⁰ An IMDB entry for actress Danica McKellar refers to her “breakthrough” role as Winnie Cooper on “The Wonder Years” and lists other television appearances.²¹ The Blast website reports on television’s “Vanderpump Rules’ Star Danica Dow.”²²

We find the evidence convincing to show consumer exposure to both “Danica” and “Danika” as a first name, and that the single-letter difference reflects a spelling variation of essentially the same name. Thus, the meaning of this term in each mark is the same. We are not swayed by Applicant’s criticisms that this name-related evidence does not come from the alcoholic beverage industry. The Examining Attorney’s evidence addresses ordinary consumer exposure to Danica/Danika as a first name, and there is no contrary evidence suggesting another meaning of either term. There is no reason that evidence of this nature, relied on for this purpose, needs to relate to the alcohol industry. The evidence is relevant and persuasive.

¹⁶ TSDR August 24, 2020 Office Action at 12-24 (danikabrysha.com).

¹⁷ *Id.* at 25-26 (wisconsinrivers.org).

¹⁸ *Id.* at 29 (banfield.com).

¹⁹ *Id.* at 31 (rileychildrens.org).

²⁰ *Id.* at 33 (bsualumni.org).

²¹ *Id.* at 36-40 (imdb.com).

²² *Id.* at 41-49 (theblast.com).

Citing TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMEP) § 1207.01b)(v) (2021), Applicant points to the lack of a consent of a living individual statement in the file of the cited registration, and the lack of a statement that DANIKA does not refer to a living individual, as support for its contention that “the average consumer will not understanding the meaning or connotation of DANIKA in connection with ‘alcoholic beverages, excluding beer’ to be a personal name.”²³ However, “when the name in a mark is a first name, ... an inquiry [as to a reference to a living individual] is usually unnecessary unless the available information indicates that the relevant public will recognize or perceive the name as identifying a particular individual.” TMEP § 1206.03. Thus, contrary to Applicant’s suggestion, the prosecution history of the cited registration does not reflect any view of the USPTO that Danika is not a first name.²⁴

As noted above, the cited mark’s additional word RANCH refers to the nature of the winery or distillery making the goods. The descriptive word RANCH does not change the connotation or impression of DANIKA, and the mark DANIKA RANCH has the meaning and impression of the goods coming from the ranch of someone

²³ 9 TTABVUE 9-10 (Applicant’s Brief).

²⁴ For the first time in its Reply Brief, Applicant asserts that “assuming the average wine consumer recognizes DANIKA as a given name, it is undisputed that it is a weak given name, entitled to a narrow scope of protection.” 12 TTABVUE 5. This argument was forfeited because it was not raised in Applicant’s opening brief. *See Threshold.TV Inc. v. Metronome Enters. Inc.*, 96 USPQ2d 1031, 1035 (TTAB 2010) (a party “cannot be allowed to wait until its reply brief to raise” an issue); *see also In re Lar Mor Int’l, Inc.*, 221 USPQ 180, 183 (TTAB 1983) (“this argument and supporting evidence should have been presented to the Examining Attorney during the prosecution of this case”). The argument lacks merit regardless, where Applicant offered no supporting evidence. We accord the cited registration the ordinary degree of protection.

named Danika. This is similar to the meaning and impression of Applicant's proposed mark DANICA, which gives the impression of the goods coming from someone named Danica. Ultimately, the spelling variation of the name and the addition of the word RANCH do not substantively distinguish the marks in terms of connotation or commercial impression. The marks as a whole remain similar in meaning and commercial impression.

Applicant also argues under this factor that in the context of wine, pursuant to a labelling requirement of the Alcohol and Tobacco Tax and Trade Bureau, use of the term RANCH on a label signifies that 95% of the wine must be produced from primary winemaking materials grown on the named ranch.²⁵ Applicant contends that because this word carries legal significance on a wine label, its use in the cited mark changes the meaning and connotation of the mark. According to Applicant, "[w]hen the average purchaser of wine encounters the DANIKA RANCH mark, the Cited Mark will convey that [registrant's] chardonnay wine is produced using 95% of the wine making material from the Danika Ranch..."²⁶ While we are not convinced that most consumers are aware of this regulatory requirement, regardless, the reference in this mark would be to a property where wine-making materials are produced, the ranch of "Danika," which is essentially the same name that forms the entirety of Applicant's

²⁵ 9 TTABVUE 5 (Applicant's Brief, citing 27 C.F.R. § 4.39(m)).

²⁶ 9 TTABVUE 6 (Applicant's Brief).

mark. Thus, we do not agree that RANCH changes the meaning and impression in a way that avoids likely confusion.²⁷

Applicant points to a precedential decision of the Federal Circuit, *Champagne Louis Roederer, S.A. v. Delicato Vineyards*, 148 F.3d 1373, 47 USPQ2d 1459 (Fed. Cir. 1998), and a non-precedential decision of the TTAB, *In re Hutchinson and Stengl*, Serial No. 86809909 (TTAB August 9, 2019), as allegedly analogous cases in which a second mark adds a word to the identical term in the first mark, and thereby transforms its meaning and avoids confusion.


In *Champagne Louis Roederer*, despite legally identical goods, the mark CRYSTAL CREEK was found sufficiently different from CRISTAL to avoid confusion. The Court affirmed the Board's finding that CRISTAL "suggested the clarity of the wine within the bottle or the glass of which the bottle itself was made," CRYSTAL CREEK brought to mind "a very clear (and hence probably remote from civilization) creek or stream." 47 USPQ2d at 1460. By contrast, in this case, as noted above, with the addition of RANCH, DANIKA retains its meaning as a female first name, and the combination creates the sense of a farm or property owned by that person. Unlike CREEK, as Applicant takes great pains to emphasize, RANCH in the context of wine has a recognized meaning as a type of wine-producing property. Thus, consumers familiar with DANIKA RANCH for wine who hear of DANICA for wine would likely

²⁷ The disclaimer of RANCH in the cited registration indicates that it was not considered unitary with DANIKA so as to create a distinct meaning of DANIKA RANCH independent of the constituent elements. See TMEP § 1213.05 (if matter is unitary, no disclaimer is necessary).

assume that it is a variation from the same source. As for the subset of those wine consumers familiar with the regulatory requirement associated with “ranch” stressed by Applicant, they likely would view the DANICA wine as coming from the same source but not predominantly made from materials grown on the ranch.

Turning to *Hutchinson and Stengl*, we note as an initial matter that while the Board permits citation to non-precedential decisions, they are not binding on the Board, and instead are considered for whatever persuasive value they may have. See TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 101.03 (2021) (discussion of “decisional law”). Further, in *Hutchinson and Stengl*, the marks



at issue were CANNONBALL versus . Applicant’s summary of the Board’s differentiation of the marks neglects to mention that “[a]pplicant’s mark include[d] a noticeable design element” and the non-identical word CREEK was “visually the largest element in [a]pplicant’s mark.” Second, whereas in *Hutchinson and Stengl*, the cited mark CANNONBALL connoted a missile, but the proposed mark conveyed “the name of a particular waterway,” we find no analogous transformation in this case. We thus find this decision distinguishable as well. To the extent that DANIKA RANCH would be perceived as a place, it would be perceived as a wine-producing property belonging to DANIKA/DANICA.

In this case, with the non-dominant feature of the cited mark (i.e., RANCH) appropriately discounted, *Chatam Int’l*, 71 USPQ2d at 1946-47, where Applicant’s

mark is nearly identical to the dominant feature of the cited mark, varying only by a single letter that does not change the sound of the name, we find that the marks in their entirety convey a similar appearance, sound, connotation and commercial impression. Thus, the first *DuPont* factor favors a finding of likelihood of confusion.

III. Conclusion

The similarity of the marks for legally identical goods that move in overlapping channels of trade to the same classes of customers renders confusion likely.

Decision: The refusal to register Applicant's mark DANICA under Section 2(d) of the Trademark Act is affirmed.